Chew Phang Oo v Timbalan Menteri Dalam Negeri, Malaysia

HIGH COURT (PENANG) — CRIMINAL APPLICATION NO 44-16-90
EDGAR JOSEPH JR J
8 SEPTEMBER 1990

Preventive Detention — Fresh detention order — Validity of — Fresh detention order made under s 6(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 in substitution for direction extending original period of detention — Whether a direction order can be substituted by a 'fresh' detention order — Dangerous Drugs (Special Preventive Measures) Act 1985, ss 3(3), 5(4), 6(1), (3), 11A & 11B(2) — Constitution of the Federation of Malaysia, arts 8 & 149

Preventive Detention — Necessity for fresh reports — 'Fresh' detention order made under s 6(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 in substitution for direction extending original period of detention — No fresh reports by police officer and enquiry officer — Effect on validity of fresh detention order — Dangerous Drugs (Special Preventive Measures) Act 1985, ss 3(3), 5(4) & 6A(2)

The applicant had been detained under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the 1985 Act') for two years, with effect from 19 September 1987. On 15 September 1989, a direction in writing was made by the deputy minister under s 11A, extending the period of detention for a further two years with effect from 18 September 1989. Subsequently, the direction was revoked but contemporaneously with the revocation order, a fresh detention order was made authorizing the continued detention of the applicant for 18 months with effect from 12 March 1990.

The applicant sought to impugn the validity of the fresh detention order on the ground, inter alia, that the deputy minister, in issuing the fresh detention order in substitution for the direction order, had acted ultra vires the powers conferred upon him by s 11B(2) of the 1985 Act.

Held, allowing the application:

(1) So far as the directions under s 11A are concerned, upon revocation thereof, the deputy minister may substitute another direction of the same kind as that revoked but he may not substitute, any of the orders mentioned in s 6(1) or s 6(3). To hold otherwise would amount to brushing aside the adjective 'fresh' which qualifies the words 'order' and 'direction' in s 11B(2).

(2) A 'fresh' order presupposes that what had been revoked was a previous order but not a direction. When a previous direction has been revoked and the minister purports to substitute a detention order, what he has substituted is not a 'fresh' detention order but a detention order simpliciter because what was revoked was not a detention order. Accordingly, the minister had acted ultra vires the powers conferred upon him by s 11B(2).

(3) Section 6A(2) (the amendment to s 6A effected by s 3(1)(b) of the Dangerous Drugs (Special Preventive Measures) Act 1990) applies only to fresh detention orders or fresh restriction orders. The detention order in this case was not a fresh detention order. Section 6A(2) is therefore not applicable and so the necessity for fresh reports by the police officer and the enquiry officer under ss 3(3) and 5(4) of the 1985 Act cannot be dispensed with.

[Bahasa Malaysia summary

Pemohon telah ditahan di bawah s 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta 1985') untuk dua tahun, bermula daripada 19 September 1987. Pada 15 September 1989, satu arahan bertulis telah dibuat oleh timbalan menteri di bawah s 11A, melanjutkan tempoh tahanan untuk dan tahun lagi bermula daripada 18 September 1989. Kemudiannya, arahan itu dimansuhkan tetapi pada masa yang sama dengan arahan pemansuhan itu, satu perintah tahanan baru telah dibuat untuk terus menahan pemohon selama 18 bulan bermula daripada 12 Mac 1990.

Pemohon cuba mencabar kesahihan perintah tahanan yang baru itu atas alasan, antara lain, bahawa timbalan menteri, dalam mengeluarkan perintah tahanan yang baru untuk menggantikan arahan itu, telah bertindak ultra vires kuasa-kuasa yang deberikan kepadanya oleh s 11B(2) Akta 1985.

Diputuskan, meluluskan permohonan itu:

(1) Sejauh mana arahan di bawah s 11A adalah berkenaan, apakala dimansuhkan, timbalan menteri boleh menggantikannya dengan satu lagi arahan jenis yang sama tetapi beliau tidak boleh menggantikannya dengan apa-apa perintah yang dinyatakan di dalam s 6(1) atau s 6(3). Untuk memutuskan sebaliknya bermakna tidak mengendahkan sifatnama 'fresh' yang membatasi perkataan-perkataan 'order' dan 'direction' di dalam s 11B(2).

(2) Satu perintah baru ('fresh') membayangkan bahawa apa yang dimansuhkan itu adalah satu perintah terdahulu dan bukan satu arahan. Bila satu arahan terdahulu dimansuhkan dan timbalan menteri kononnya menggantikannya dengan satu perintah tahanan, apa yang diganti itu bukan satu perintah tahanan baru tetapi satu perintah tahanan 'simpliciter' kerana apa yang dimansuhkan itu bukan satu perintah tahanan. Lantaran itu, timbalan menteri telah bertindak ultra vires kuasa yang diberikan kepadanya oleh s 11B(2).

(3) Seksyen 6A(2) (pindaan kepada s 6A yang dikuatkuasakan oleh s 3(1)(b) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1990) cuma terpakai kepada perintah tahanan baru atua perintah sekatan baru. Oleh kerana itu, s 6A(2) tidak boleh digunakan di sini dan lapuran baru oleh pegawai polis dan pegawai penyiasatan di bawah ss 3(3) dan 5(4) Akta 1985 adalah perlu.]

Cases referred to

1 *Tan Hoon Seng* v *Menteri Hal Ehwal Dalam Negeri & Anor* [1990] 1 MLJ 171 (refd)
2 *Haji Omar Din bin Mawaidin* v *Minister of Home Affairs & Anor* [1990] 3 MLJ 435 (distd)
3 *PP* v *Datuk Harun bin Haji Idris* [1976] 2 MLJ 116 (refd)
4 *Datuk Haji Harun bin Haji Idris* v *PP* [1977] 2 MLJ 156 (refd)
5 *PP* v *Khong Teng Khen* [1976] 2 MLJ 166 (refd)
6 *Koh Chai Cheng* v *PP* [1981] 1 MLJ 64 (refd)
7 *Poh Chin Kay* v *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 297 (folld)
8 *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 (folld)
9 *Oh Peng Kee* v *Menteri Hal Ehwal Dalam Negeri & Anor* (Penang High Court Criminal Application No 47/88) (unreported) (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(3), 5(4), 6(1), 6A(2), 11A, 11B(2)

M Athimulan for the applicant.
Jalaldin bin Hussain (Senior Federal Counsel) for the respondents.

Cur Adv Vult

Edgar Joseph Jr J: The essential facts to be garnered from the affidavit of the Deputy Minister of Home Affairs ('the deputy minister') may be stated shortly.

The applicant had been detained under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act of 1985') by virtue of a detention order dated 18 September 1987 ('the detention order') authorizing his detention for a period for two years with effect from 19 September 1987 at the Pusat Pemulihan Akhlak, Muar, Johore, or at such other place as the deputy minister might designate.

But then, by a direction in writing dated 15 September 1989 ('the direction') issued by the deputy minister pursuant to s 11A of the Act of 1985, the period of the applicant's detention was extended for a further period of two years with effect from 18 September 1989.

However, the deputy minister went on to say that subsequently, having regard to the circumstances of the case, he was satisfied that it was in the interests of justice that this was a fit and proper case for the direction to be revoked but he added that he was also satisfied that a fresh detention order under s 6(1) of the Act of 1985 should be issued in substitution for the direction which had been revoked. Accordingly, contemporaneously with the issuance of a revocation order ('the revocation order') revoking the direction, there was also issued what purported to be a fresh detention order ('the fresh detention order') both dated 12 March 1990 and authorizing the continued detention of the applicant for a period of 18 months with effect from that date.

Counsel for the applicant has sought to impugn the fresh detention order under s 6(1) of the Act of 1985 on three separate grounds, namely:

(a) the Dangerous Drugs (Special Preventive Measures Act 1990 ('the Act of 1990') and, in particular, ss 3 and 5 thereof, are inconsistent with and therefore in violation of art 8 of the Federal Constitution;
(b) the revocation by the deputy minister of the direction and the contemporaneous substitution of the fresh detention order on the eve of the day fixed for the hearing of this application was a mala fide exercise of powers, it being aimed at denying the applicant the benefit of the decision of the Supreme Court in *Tan Hoon Seng* v *Menteri Hal Ehwal Dalam Negeri & Anor*,[1] so that there was a violation of art 5 of the Constitution;
(c) section 5 of the Act of 1990, being a validation measure, had to be comprised in a separate Act;
(d) the deputy minister in issuing the fresh detention order in substitution for the direction, had acted ultra vires the powers conferred upon him by s 11B(2) of the Act of 1985.

As to ground (a)

It was submitted by counsel for the applicant that the requirements of s 6 of the Act of 1985, whereby the minister has to consider a complete report of investigation by a police officer making an investigation pertaining to a person arrested and detained under s 3(1) and the report of the enquiry officer submitted under s 5(4), before being satisfied that such person has been or is associated with any activity relating to or involving the trafficking of drugs and as such that it is necessary in the interest of public order that such person be detained, amount to protection under the law within art 8 of the Constitution.

Accordingly, it was submitted that because s 3(2) of the Act of 1990 provides that no fresh detention or fresh restriction order shall be invalid or inoperative by reason of the fact that no fresh report by a police officer or by an enquiry officer has been submitted, a detainee could be deprived of the safeguards to which he had been previously entitled, at the whim and fancy of the minister, with the result that there was a violation of art 8 of the Constitution which guaranteed the subject equal protection of the law. In support, my decision in *Haji Omar Din bin Mawaidin* v *Minister of Home Affairs & Anor*[2] was cited.

In considering this branch of the argument advanced by counsel for the applicant, I have kept in the forefront of my mind, on the one hand, the principle that such is the sanctity of art 8(1) of the Constitution that no such law enacted by virtue of art 149(1) can, notwithstanding its special nature, violate its provisions (*PP* v *Datuk Harun bin Haji Idris*[3] at p 118) and, on the other, that in considering art 8 there is a presumption that an impugned law is constitutional (*Datuk Haji Harun bin Haji Idris* v *PP*[4] at p 165 per Suffian LP).

In view of the importance of arts 8 and 149 in the context of counsel's argument, I must reproduce them. Article 8 reads as follows:

> (1) All persons are equal before the law and entitled to the equal protection of the law.
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.
(4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.
(5) This article does not invalidate or prohibit —
(a) any provision regulating personal law;
(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion;
(c) any provision for the protection, well being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;
(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that state or part, or for voting in such an election;
(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;
(f) any provision restricting enlistment in the Malay Regiment to Malays.

Article 149 reads as follows:

(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or
(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
(c) to promote feelings of ill-will and hostility between races or other classes of the population likely to cause violence; or
(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9 or 10, or would apart from this article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

Prior to the insertion of the present paras (e) and (f), cl (1) of art 149 related to subversion, ie acts of political or seditious nature. The new paragraphs are designed to allow the enactment of permanent special powers, previously found in emergency regulations and could cover ordinary (ie non-political) crime, labour disputes and local hooliganism. The Prime Minister was reported in the *New Straits Times* of 8 and 23 December 1978, to have said when moving the amendments in both Houses that they were proposed in order to deal effectively with the increasing problem of narcotic trafficking and secret society activities.

The Act of 1985, the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1988 (Act A707) and the Act of 1990 were passed under art 149.

In *PP* v *Khong Teng Khen*[5] at p 170 Suffian LP, speaking for the Federal Court said:

> The principle underlying art 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation ...'. All that art 8 guarantees is that a person in one class should be treated the same as another person in the same class ...

So too, Lord Diplock when delivering the advice of the Judicial Committee of the Privy Council on the proper interpretation of art 12(1) of the Singapore Constitution (in pari materia with our art 8) said, in *Koh Chai Cheng* v *PP*[6] at p 72:

> 'Equality before the law', 'equal protection of the law' require that like should be treated with like. What art 12(1) ... assures the individual is the right to equal treatment with other individuals in similar circumstances.

Approaching the issue raised by counsel in the way indicated by the authorities cited, I fail to see how it could be said that the applicant has established the necessary degree of discrimination to constitute a violation of art 8. It is true that in support counsel had pointed out that there were other detainees in the same position as the present applicant but who had not applied for habeas corpus, in regard to whom, the minister had not exercised his power of substituting a fresh detention order under s 6(1) of the Act of 1985. However, there was not an iota of evidence to support this assertion.

Moreover, although the Act of 1990, by s 3(1)(b), ensures the validity and operative force of a fresh detention order or a fresh restriction order notwithstanding the absence of a fresh report by a police officer or an enquiry officer even when the detention order or the restriction order has been made on the same grounds as the previous detention order or the restriction order, it still requires the minister to exercise his discretion bona fide and in the public interest having regard to the requirements of s 6(1) of the Act of 1985. This he can only do by relying upon the old reports of the police officer and the enquiry officer concerned.

Therefore, although it is true to say that the Act of 1990 has reduced the safeguards previously provided

for under the Act of 1985, which required fresh reports by both the police officer and the enquiry officer (see *Poh Chin Kay*'s case[7]) it would be wrong to say, as does counsel for the applicant, that those safeguards have been totally taken away.

Both the Act of 1985 and the Act of 1990 were made pursuant to powers given to Parliament by art 149. So the safeguards given by the Act of 1985 can be curtailed by the Act of 1990.

As for *Omar Din*'s case,[2] there the question of law involved was whether the minister could revoke a restriction order under s 4A(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, and substitute for it a detention order under s 4(1) without first complying with the requirements of detention pending under s 3(1)? I answered this question in favour of the detainee, because I was of the view that the applicant was entitled to the safeguard of enquiries upon detention, yet he had been denied that right, with the consequence that he had lost the chance which was fairly open to him in law of exculpating himself from the allegations made against him. Article 8 was thus never in issue and so that case is readily distinguishable from the instant case. It follows, the objection based on art 8 fails.

As to ground (b)

I now turn to consider the submission that the revocation by the deputy minister of the direction and the contemporaneous substitution of the detention order on the eve of the day fixed for the hearing of the application was a mala fide exercise of powers, it being aimed at denying the applicant the benefit of the decision of the Supreme Court in *Tan Hoon Seng*'s case,[1] thus resulting in a violation of art 5(1) which reads:

> No person shall be deprived of his life or personal liberty save in accordance with law.

Once it is shown that a subject has been detained in exercise of a valid legal power the onus of proving mala fides lies on the subject. To quote Suffian FJ (as he then was) in *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri Malaysia*[8] at p 152:

> ... the onus of proving the legality of the detention is on the minister in the first instance. This he can discharge simply by producing the order of detention which, if its authenticity and good faith are not impugned, is a sufficient answer. If the detainee alleges mala fides, as he does here, then the onus shifts to him and it is for him to prove mala fides.

As to proof of mala fides, HT Ong CJ (Malaya) said in *Karam Singh*'s case[8] at p 141:

> If it was true that the order came to be made in a casual or cavalier fashion, it cannot properly be said that the Cabinet or the minister concerned had been 'satisfied'. On the other hand, if the decision was made upon a proper evaluation of the facts and surrounding circumstances and after due deli-beration, that was all that could be required for the issue of an order based on subjective satisfaction. In the final analysis, the issue is one of fact (p 142). Once we accept that the Cabinet did satisfy themselves as to the propriety of the order that is the end of the matter.

Assuming therefore that the minister had acted as he did, to deprive the applicant of the benefit of the decision of the Supreme Court in *Tan Hoon Seng*'s case,[1] that in itself would not, in my view, justify a finding that the minister had acted mala fide. There must be evidence from which the court can infer mala fides within the meaning of *Karam Singh*.[8] It is not enough to show that the effect of the minister acting as he did in this case was to deprive the applicant of the benefit of the decision of the Supreme Court in *Tan Hoon Seng*'s case.[1] Once I accept, as I do, that the minister did satisfy himself as to the propriety of the detention order — and this appears from his affidavit — then that is the end of the matter so far as the issue of mala fides is concerned.

As to ground (c)

It was further argued that s 5 of the Act of 1990 being a validation measure should have comprised in a separate Act. In particular, it was pointed out that the Act of 1990 is an amending Act designed to nullify the decision of the Supreme Court in *Poh Chin Kay*'s case.[7]

I regret I am unable to agree. As had been pointed out by my brother Mohamed Dzaiddin J in *Oh Peng Kee* v *Menteri Hal Ehwal Dalam Negeri and Anor*,[9] the preamble to the Act of 1990 states that it is an Act to amend the Act of 1985 and to provide for matters connected therewith. Accordingly, although s 5 is a validation measure, there is nothing to inhibit Parliament from incorporating it as part of an amending Act rather than making it the subject of a separate Act.

As to ground (d)

The applicant was on firmer ground, as regards his submission that the power conferred by s 11B(2) of the Act of 1985 upon the minister, upon revocation of any detention order or any restriction order or any suspended detention order or any direction to extend the duration of a detention order, and to substitute a fresh order or a fresh direction is limited to substituting orders or directions of the same kind as those which have been revoked. For example, the minister could substitute a fresh direction extending the duration of a previous direction but not a fresh detention order for a previous direction extending the duration of a detention order — so ran counsel's submission.

As s 11B is of central importance to this submission, I must reproduce it; it reads as follows:

> (1) Notwithstanding anything contained in this Act, the Minister may at any time revoke any detention order made

under subsection (1) of section 6, or any suspended detention order, or any direction under subsection (1) of section 11A for the extension of the duration of any such order, if he deems it just or fit to do so.

(2) Any revocation under subsection (1) shall be without prejudice to the validity of the order or direction before its revocation or to anything done thereunder, or to the power of the Minister to make a fresh detention order under subsection (1) of section 6 or a fresh restriction order under subsection (3) of section 6 or a fresh direction under subsection (1) of section 11A in respect of the person against whom the order or direction which is revoked was made or given.

As a matter of first impression, the words 'a fresh detention order or ... a fresh direction as is mentioned under subsection (1) ...' can only mean another order or direction of the same kind as that revoked. To illustrate, the minister can only substitute a fresh detention order upon revocation of a previous detention order or substitute a fresh direction that the duration of a detention order be extended upon revocation of a previous direction of the same kind.

In other words, power resides in the minister to revoke any of the orders specified in s 6(1), (3) or any direction under s 11A(1) and to substitute, in lieu thereof, any fresh orders or any fresh direction though not necessarily of the same kind. To illustrate, the minister may substitute a detention order upon revocation of a prior restriction order (provided of course the conditions precedent laid down in ss 3, 4, 5 and 6 are satisfied) or he may do the opposite, that is to say, substitute a restriction order for a detention order.

However, so far as directions under s 11A are concerned, upon revocation thereof, he may, of course, substitute another direction of the same kind as that revoked but he may not substitute, any of the orders mentioned in s 6(1) or s 6(3).

Stepping back and taking a second hard look at this branch of the applicant's submissions, to hold otherwise would amount to brushing aside the adjective 'fresh' which qualifies the words 'order' and 'direction' in s 11B(2). A *fresh* order presupposes that what had been revoked was a previous order but not previous direction. So, when as here, a previous direction has been revoked and the minister purports to substitute a detention order, what he has substituted is not a *'fresh* detention order' but a detention order simpliciter because what was revoked was not a detention order. I might add that the concluding words in s 11B(2) '..... in respect of the person against whom the order or direction is revoked was made or given' provide strong reinforcement for this view.

Accordingly, in acting as he did, the minister had acted ultra vires the powers conferred upon him by s 11B(2). On this ground alone, I would grant the application for habeas corpus.

But, on a further ground also the applicant is entitled to succeed. As I have said, in this case, a detention order was substituted for direction extending the applicant's period of detention, without there being fresh reports by a police officer and an enquiry officer under s 3(3) and s 5(4) of the Act of 1985, respectively. It goes without saying that prior to the coming into force of the Act of 1990 this would have rendered the applicant's continued detention unlawful (see *Poh Chin Kay* v *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*[7]).

The question therefore arises whether the amendment effected by s 3(1)(b) of the Act of 1990 to s 6A, ie by the insertion of s 6A(2), can apply to exempt the executive from having before it the fresh reports concerned, before substituting a detention order for a direction.

It is necessary to reproduce s 6A(2) which provides:

No fresh detention order or fresh restriction order referred to in subsection (2) of section 11B shall be invalid or inoperative by reason that no fresh report has been submitted under subsection (3) of section 3 and subsection (4) of section 5 or that that detention order or restriction order was made on the same ground as the previous detention order or restriction order.

It will be seen that s 6A(2) applies only to *fresh* detention orders or *fresh* restriction orders.

Having regard to my view that the detention order in this case was *not* a fresh detention order because it was *not* made in substitution for a previous detention order but instead was in substitution for a direction extending the period of detention, I fail to see how s 6A(2) can be of any assistance to the minister.

It follows that the principles in *Poh Chin Kay*'s case[7] would continue to apply to the present case and so the necessity for fresh reports by the police officer and the enquiry officer under ss 3(3) and 5(4) of the Act of 1985 respectively, cannot be dispensed with.

Accordingly, the applicant is entitled to succeed on this ground as well. In all the circumstances, I granted habeas corpus, and directed that the applicant be set at liberty forthwith.

Order accordingly.

Solicitors: *Shan & Gooi.*

Reported by *Zarinah Marican*